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No. 96-152

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In The

Supreme Court of the United States

October Term, 1995

RUDOLPH W. GIULIANI
as Mayor of the City of New York, *et al.*,

Petitioners,

- against -

HAROLD YOURMAN, *et al., etc.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI BY AMICI CURIAE NATIONAL LEAGUE OF CITIES, INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION, GOVERNMENT FINANCE OFFICERS ASSOCIATION, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND NEW YORK CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS

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I. INTRODUCTION

This Fair Labor Standards Act (FLSA) case presents agency rulemaking and constitutional issues of enormous importance to public employers across the United States. The seemingly obscure administrative regulation at issue, 29 C.F.R. section 541.118 (the "salary basis test"), has generated hundreds of public sector cases.[1] Conflicting holdings throughout the federal courts have resulted, all because of an *admitted mistake* by the United States Department of Labor (DOL). In DOL's own words: "The regulations were . . . *out of harmony with the intent of the [FLSA]* because State and local governments could not practically avail themselves of the exemptions intended by Congress, and thus were *inappropriate* as applied in the public sector." 57 Fed. Reg. 37666, 37672 (Aug. 19, 1992) (emphasis added).

Despite this significant admission, DOL has *never* conducted rulemaking to determine whether the salary basis test appropriately distinguishes between white collar and non-exempt employees in the public sector. Although DOL conducted limited rulemaking in 1991-1992, the Department expressly refused to consider numerous subparts of the test. Thus, since the FLSA was extended to public entities in 1986 as a result of the

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[1] With certain exceptions, the salary basis test requires exempt employees to be paid a weekly predetermined amount of compensation, "without regard to the number of days or hours worked." 29 C.F.R. § 541.118(a). The test has wreaked havoc among public entities because public employees traditionally are paid *only* for time actually worked, regardless of rank or stature.

Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), DOL has never gathered evidence or conducted any analysis about whether the salary test subparts at issue in this case appropriately apply in the public sector.

Amici recognize the broad deference usually accorded administrative regulations. But the doctrine of judicial deference is contingent upon the agency carrying out its essential rulemaking responsibilities. At a minimum, federal agencies must make a conscious decision about their regulations, and articulate their rationale based on *some* evidence.

The extension of the FLSA to millions of public employees in 1986 was surely an event of sufficient magnitude to trigger an obligation by DOL to determine whether the salary basis concept had some meaningful and appropriate effect in the public sector. Yet, the astonishing truth here is that DOL has done nothing to address this key issue. The salary basis test, which was enacted in the 1940s and 1950s, was simply allowed to apply in the public sector *by inaction*.

The rulemaking record here demonstrates unequivocally that DOL has violated the fundamental rulemaking principles confirmed by the Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Further, DOL has ignored the federalist principles emphasized by the Court in *Bowen v. American Hospital*, 476 U.S. 610 (1986). These principles prohibit federal agencies from impinging on matters of local concern, such as the manner in which local employees are disciplined, without doing one very simple thing: they must

articulate a justification founded on statutory authority and an administrative record. This is not a difficult burden under most circumstances. But DOL has openly rejected this responsibility, in direct violation of *Bowen*, and at an enormous cost to state and local government.[2]

Amici urge the Court to grant certiorari to correct DOL's regulatory mismanagement, and to clarify DOL's ongoing rulemaking responsibilities under the FLSA.

II. INTEREST OF AMICI CURIAE

Amicus curiae National League of Cities (NLC) is the country's oldest and largest organization serving municipal government. Its direct members include more than 1,400 cities of all sizes and 49 state municipal organizations, with a combined membership of over 17,000 municipalities. As a membership organization of general purpose local governments, NLC is dedicated to advancing the interests of municipal government at both the state and national level. It has a compelling interest in legal issues affecting the powers and responsibilities of local governments, and its members have been directly impacted by the issues presented in this case.

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[2] Amici are aware that salary basis cases against state and local governments across the Country have cost public entities millions of dollars in backpay judgments, settlements and defense costs. In this case alone, the employees claim that their judgment amounts to $14 million in backpay and liquidated damages. (Respondents' Opp. Br., p. 7, n.9.)

The interests of the other seven amici curiae represented in this brief are listed in Appendix B.[3]

III. RULEMAKING RECORD

The administrative rule at issue in this case – the salary basis test – is not found anywhere in the FLSA itself. Rather, the rule was created by DOL and is contained entirely in DOL's administrative regulations. *See* 29 C.F.R. § 541.118. The FLSA mandates simply that its overtime provisions "*shall not apply* with respect to . . . any employee employed in a bona fide executive, administrative, or professional capacity. . . . " 29 U.S.C. § 213(a)(1). Congress delegated to DOL the responsibility to define (but not to destroy) these "white collar exemptions." *Id.* The administrative record underlying the salary basis test is therefore critical.

DOL developed the salary test in 1940 based upon hearings showing white collar employees in industries "then-subject to the FLSA" – *i.e.*, private industry – "were nearly universally paid on a salary basis." 57 Fed. Reg. at 37672. "These fact based inquiries, conducted before the public sector became subject to the FLSA, did not include an examination of prevailing governmental pay practices." *Id.* According to DOL, the very fact that white collar employees were "almost universally paid on a salary basis" in the private sector constituted the principal rationale for applying this test for exempt status. *Id.* at 37672.

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[3] All parties have consented to amici curiae filing this brief. See Appendix A.

The tortured history of the salary basis test in the public sector began in November 1985, when DOL issued an Advanced Notice of Proposed Rulemaking ("ANPR") soliciting views on 29 C.F.R. Part 541 regulations. DOL soon learned through commentary that because of public pay practices, the existing salary test destroyed the FLSA's white collar exemptions in the public sector. 57 Fed. Reg. at 37667.

Five months later, in connection with the Fair Labor Standards Amendments of 1985, DOL proposed rules implementing special provisions applicable to local and state governments. 51 Fed. Reg. 13402 (Apr. 18, 1986). After receiving comments, DOL acknowledged that the salary basis test was flawed, but stated: "In light of the separate rulemaking process with respect to Part 541, it would not be appropriate for the Department to address this issue. . . . " 52 Fed. Reg. 2019 (Jan. 16, 1987). "[T]he Department expects to publish a notice of proposed rulemaking concerning Part 541 during 1987." *Id.*

Despite its promise, DOL conducted *no* rulemaking on this issue over the next four years. "In the meanwhile, public employers and public employees found themselves in complex litigation trying to grapple with these pressing issues on which the DOL should have provided guidance, but did not." *SEIU, Local 102 v. County of San Diego* ("SEIU"), 60 F.3d 1346, 1359 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 734 (Jan. 16, 1996).

Recognizing that its own delay might lead to the improper application of the salary basis test to public entities, DOL did issue a stopgap letter ruling in January 1987. The ruling noted that state and local governments

have "statutory provisions which prohibit any employee from being paid for time not actually worked," and that federal employees are also subject to such rules. DOL stated: "While consideration is being given to proposed changes in the regulations, a *non-enforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees.*" 57 Fed. Reg. at 37668 (emphasis added).

Unfortunately, DOL failed to amend or suspend its regulations, as it plainly should have. Instead, after recognizing a serious problem and adopting a non-enforcement policy, DOL left the door open to private lawsuits. "In effect, the DOL abdicated its central role in this evolving process and punted, sending the salary basis test and the overtime compensation issue to the courts." *SEIU*, 60 F.3d at 1357.

"In the tumultuous wake" of *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), *cert. denied*, 498 U.S. 1068 (1991), "DOL conceded that its nonenforcement policy and its deference to the courts, coupled with its own failure to act, had resulted in an open Pandora's box." *SEIU*, 60 F.3d at 1358. In 1991, DOL attempted to correct its regulatory lapse through emergency rulemaking. Through an Interim Final Rule ("IFR"), DOL waived the normal notice and comment period in recognition that the salary test "could well result in enormous, unforeseen liability of such governments and may threaten their fiscal integrity." 56 Fed. Reg. 45824, 45825 (Sep. 6, 1991). The IFR authorized deductions from salary and leave balances, thereby eliminating the effect of *Abshire*, but left intact the rest of the salary test.

In August 1992, DOL published a Final Rule on the salary test. With certain exceptions, the Final Rule is virtually identical to the IFR. *Compare* 29 C.F.R. § 541.5d, 57 Fed. Reg. at 37677 *with* the IFR, 56 Fed. Reg. at 45826.

In the 1992 Final Rule, DOL made some extremely significant admissions.

1. Whereas private employers had the ability to change their practices to conform, "public sector pay policies . . . evolved over the years subject to constraints in statutes, ordinances or policies based on public accountability principles that preclude paying public employees for hours not worked . . . " 57 Fed. Reg. at 37667.

2. When Congress first amended the FLSA to apply to public entities in 1974, it manifested a clear intent that the executive, administrative and professional exemptions apply to public employment. *Id.* at 37667, 37672. "Congress presumably was unaware that, because many public sector compensation systems preclude payment for hours not worked," these systems would fail the salary test. *Id.* at 37672.

3. When the FLSA first became applicable to local governments – "most" public employers had rules prohibiting employees, including highly paid employees, from receiving pay for time not actually worked, absent leave balances. As a result, they did not meet the salary test. Congress' silence in the 1985 amendments regarding this issue "is not indicative of an intent to make the . . . exemption[s] unavailable to public sector employers," because the issues regarding

the salary test were not "generally recognized" at the time. *Id.* at 37672.

4. Application of aspects of the salary basis test to the public sector "did not serve their intended purpose." "State and local governments were thus being inappropriately deprived" of such exemptions. *Id.* at 37670.

5. "In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to State and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. The regulations were thus out of harmony with the intent of the [FLSA] because State and local governments could not practically avail themselves of the exemption intended by Congress, and thus were inappropriate as applied in the public sector." *Id.* at 37672.

In light of the admissions by DOL and the rulemaking record, the Ninth Circuit has concluded that the salary basis test, *in its entirety*, violated the Administrative Procedure Act ("APA"). *SEIU*, 60 F.3d 1346. The court concluded that DOL failed to render an "engaged interpretation of the statute," and instead "simply defaulted on its mandate to interpret the Fair Labor Standards Act. . . . " *Id.* at 1356. As the Court appropriately observed:

> [T]he DOL – which caused much of this sea of troubles – should not be surprised that we have determined its *nonenforcement regulatory vacuum*

> *to have been arbitrary, capricious, and thus an abuse of discretion, entitled to no deference at all.*

Id. at 1358-59 (emphasis added).[4]

In 1992, while amending the substance of the salary test – its requirement that a salary not be subject to deductions for partial day absences – DOL declined on procedural grounds to reconsider peripheral subsections of the test. *See, e.g.*, 57 Fed. Reg. at 37674 (the disciplinary suspension issue "was not open for comment"). Despite its duty to articulate a rationale for the test, DOL again approached the issue backwards: the Department asserted that comments during the 1992 rulemaking "failed to justify" eliminating the salary test in the public sector. Again, nowhere in the 1992 regulation or commentary did DOL articulate *any* rationale for applying the salary test in the public sector.

In April 1993, DOL published a notice stating its intention to carry out rulemaking by September 1993 concerning the white collar exemptions. 58 Fed. Reg. 24569 (Apr. 1993). The year passed without action by DOL.

In April 1994, the President's Chief of Staff, Leon Panetta, asked the Secretary of Labor to "undertake a comprehensive review and revision of the FLSA overtime regulations, as they apply to the public sector, to make

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[4] In *McGuire v. City of Portland, Oregon*, ___ F.3d ___, 1996 WL 431720 (9th Cir., Aug. 2, 1996), the court of appeals recently held that the salary basis test was properly applied to public entities after September 1991. A petition for rehearing, with a suggestion for rehearing *en banc*, was filed in *McGuire* on August 16, 1996.

them workable in today's economy." (Appendix D, Ltr. from Panetta to Reich.)[5] Mr. Panetta also stated:

> [D]ue to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars.

DOL, however, never responded.

DOL's November 1994 regulatory agenda blamed "recent court rulings" for the confusion regarding its salary basis and other "white collar" regulations, and admitted that a "comprehensive review of [the white collar] regulations is both necessary and appropriate." DOL again promised rulemaking. 59 Fed. Reg. 57127, 57129 (Nov. 14, 1994). Again, the year passed with no action.

In May 1995, DOL issued another, almost identical agenda. 60 Fed. Reg. 23543, 23544 (May 8, 1995). DOL's November 1995 agenda also reiterated that "the regulations are still in need of updating and clarification." 60 Fed. Reg. 59608 (Nov. 28, 1995). Despite recognizing that its regulations are out of date, DOL again blamed the courts for inconsistent rulings. "[R]ecent court rulings have caused confusion as to what constitutes compliance with the regulations 'salary basis' criteria in both the public and private sectors." DOL added:

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[5] Amici respectfully request the Court to take judicial notice of this letter. *See* Fed. R. Evid. 201(f); *United States v. Camp*, 723 F.2d 741, 744 (9th Cir. 1984).

> Legal developments in court cases are causing *progressive loss of control* of the guiding interpretations under this exemption and are creating law without considering a comprehensive analytical approach to current compensation concepts and workplace practices. These court rulings are creating apprehension in both the private and public sectors. *Clear, comprehensive, and up-to-date regulations would provide for central, uniform control over the application of these regulations and ameliorate this apprehension.* (*Id.*, emphasis added)

Most recently, on May 13, 1996, DOL again noted that its 1992 rulemaking was "limited," its regulations are therefore "still in need of updating and clarification," and that it continues to experience a "progressive loss of control over the regulations." 61 Fed. Reg. 23238 (May 13, 1996).

IV. REASONS WHY CERTIORARI SHOULD BE GRANTED

There are at least six reasons why the Court should grant certiorari: (a) to resolve the inconsistency among the circuit courts about the validity of the regulations; (b) to address the Second Circuit's conclusion that the Court's review is appropriate and inevitable; (c) to reaffirm the federalism principles last considered by the Court in *Bowen v. American Hospital Ass'n*; (d) to enforce DOL's statutory mandate to define and delimit the white collar exemptions, and to order its compliance with the Court's opinions concerning agency authority under the Administrative Procedure Act (APA); (e) to consider the constitutionality of the regulations as applied to public

entities; and (f) to ensure uniformity with *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 2545.

A. The Court Should Resolve The Inconsistency Among The Circuit Courts About The Validity Of The Regulations

A widespread divergence exists among and even within the circuit courts regarding the validity and application of DOL's salary basis regulations. For example, in *SEIU*, 60 F.3d 1346, the Ninth Circuit struck down the regulations, finding that DOL failed to render an "engaged interpretation of the statute," and instead "simply defaulted on its mandate to interpret the Fair Labor Standards Act. . . . " 60 F.3d at 1356. Other circuits, such as the Second, Seventh and D.C. Circuits, have deferred to DOL and sustained the validity of the regulations. *See Mueller v. Reich*, 54 F.3d 438 (7th Cir. 1995), *pet. for cert. filed*, 64 U.S.L.W. 2780 (Oct. 10, 1995); *Kinney v. District of Columbia*, 994 F.2d 6 (D.C. Cir. 1993). Unless the Court accepts certiorari to resolve the issue, the validity of DOL's regulations will remain uncertain, and public entities will continue to face lawsuits and unknown obligations.[6]

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[6] The respondents in this case suggest that there is no real conflict among the circuits because the earlier circuit court decisions invalidating the regulations concerned DOL's regulations prior to its 1991 rulemaking. (Respondents' Br. In Opp. to Pet. for Cert., 14-15.) However, the liability period in this case, and in many others pending around the Country, encompasses a period prior to September 1991. While the respondents believe that the millions of dollars at stake in this and other cases "is not worthy" of Supreme Court review, this

B. The Second Circuit Specifically Contemplated Supreme Court Review

The Second Circuit invited Supreme Court review. The court of appeals expressly stated that it left "the ultimate resolution of the statutory dispute to the Supreme Court or the Congress." *Yourman v. Dinkins*, 84 F.3d 655, 656 (2nd Cir. 1996).

C. The Court Should Reaffirm The Federalism Principles Ignored By DOL

DOL continues to violate the principles of federalism confirmed by the Court ten years ago in *Bowen v. American Hospital Ass'n*, 476 U.S. 610, 645 (1986).

When the federal government seeks to regulate matters traditionally entrusted to state and local governments, it must justify its regulation. *Bowen*, 476 U.S. at 645.

> [T]he propriety of the exertion of [an agency's] authority must be tested by its relation to the purpose of the [statutory] grant and with suitable regard to the principle that whenever the

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represents an enormous amount of unfunded liability that could have a direct impact on state and local public services. Further, challenges to the prospective validity of the regulations continue to be made, and DOL continues to abdicate its responsibility to conduct rulemaking. Certiorari is therefore particularly appropriate to ensure national uniformity regarding the regulations' validity and to enforce DOL's ongoing rulemaking responsibilities.

> federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear.

Id. at 645; *see also Florida v. United States*, 282 U.S. 194, 211-12 (1931).

Applying the salary test's disciplinary restriction to state and local employees is an exertion of federal power "within what would otherwise be the domain of state power." *Bowen*, at 645. Employee discipline is fundamental to the integrity of government. *See Connick v. Myers*, 461 U.S. 138, 150-51 (1983) (affirming the compelling need to "maintain proper discipline in the public service"). The disciplinary restriction and other parts of the salary test directly affect established local personnel and payroll systems throughout the United States.

In general, public employees are covered by civil service "merit" systems. These systems are designed to prevent patronage appointments by requiring that employees be selected and separated from public service based on good cause. The requirement of good cause, in turn, has given rise to well-established, progressive disciplinary principles. In most cases, these principles require short suspensions before long suspensions. Indeed, arbitrators have reduced suspensions where lesser discipline was not first imposed.

Given these well-established principles, under *Bowen*, the initial question is not whether employers *are able* to conform their personnel systems to DOL regulations. Rather, *Bowen* requires courts *first* to consider whether DOL has articulated a solid reason founded in statutory

authority and an administrative record that would justify the federal government's requiring national uniformity on the issue of disciplinary suspensions, and the other requirements of the salary basis test, as applied to public entities.

The principles of *Bowen* make particular sense here. New York and other public agencies throughout the country have incurred massive unfunded liability to their highest paid employees because of DOL's inaction. That liability, and the cost of defending lawsuits such as this one, are borne by taxpayers. The costs are suffered too by those who rely on the essential services provided by states, cities and counties – services such as police and fire protection, hospitals, housing and street repair.

If federal agencies establish rules imposing liabilities that undermine these critical services, it is not too much to ask that the agencies articulate a solid reason founded either in the clear language of a statute, or, at very least, the clear intent of Congress.

D. DOL Must Be Directed To Do Its Job

By DOL's own admission, its regulations at issue in this case have created a nationwide "loss of control" over the white collar exemptions *mandated* by Congress. 60 Fed. Reg. 59608 (Nov. 28, 1995); 61 Fed. Reg. 23238 (May 13, 1996). Public agencies throughout the United States face lawsuits based on regulations that DOL itself declared did not comport with Congressional intent, and were inappropriate. 57 Fed. Reg. 37666 (Aug. 19, 1992).

DOL's failure to "define and delimit" the regulations violates its Congressional mandate. *See* 29 U.S.C. § 213(a)(1). DOL's failure to carry out its responsibilities continues to create unfunded liabilities and to harm public agencies.

Moreover, DOL's repeated requests for deference suggests that the agency either misunderstands the contours of its rulemaking authority, or is ignoring them. The Supreme Court should accept review to correct DOL's failure to adhere to the Court's fundamental rulemaking principles.

1. The Regulations Conflict With Congressional Intent

The most elemental principle of administrative rulemaking is that an agency cannot apply a statute the agency administers in a manner that eviscerates the statute. Any rule or regulation that cannot be harmonized with its authorizing Congressional act is a nullity. *Dixon v. United States*, 381 U.S. 68, 74 (1965); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984). A court *must* give effect to the unambiguously expressed intent of Congress. *Fort Stewart Schools v. Federal Labor Relations Auth'y*, 495 U.S. 641, 645 (1990).

Congress' intention that the white collar exemptions apply to public entities is beyond dispute. There is *no* evidence that Congress was even aware of the fact that the salary test, if applied in the public sector, would eliminate the white collar exemptions. Here, however, the very agency charged with interpreting the FLSA has admitted that applying the salary test to the public sector

cannot be squared with the statute or the expressed intent of Congress. *See SEIU*, 60 F.3d at 1353-54. Under these circumstances, the Second Circuit and other courts have erred in applying these regulations.

2. The Regulations Lack An Articulated Rationale

By not bothering even to state a rationale for its regulations, DOL has violated the principles of rulemaking established by the Supreme Court in *Motor Vehicles Manufacturers Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983); and *Chevron*, 467 U.S. 837. These cases establish that agency interpretations of a statute may be upheld *only* where courts determine that an agency's interpretations represent a reasonable accommodation of competing interests, and that the agency has considered the problem and made a conscious decision based on evidence. In various amici curiae briefs in other cases, DOL suggests that it is not bound by these Supreme Court authorities, and that courts must always defer to its regulatory interpretations based on authorities holding that agency actions are entitled to deference. The Court should grant certiorari to apply its previous APA decisions, and remind DOL that its actions are subject to the principles established by the Court.

3. DOL's Delay In Rulemaking In Itself Violates The APA

DOL has violated its duty to define and delimit the white collar exemptions on an ongoing basis. The Court

has characterized the white collar exemptions as "part of a legislative code subject to continuous revision with the changing course of events." *Addison v. Holly Hill Fruit Products*, 322 U.S. 607, 617 (1944). Various authorities hold that the unreasonable delay by an administrative agency in satisfying the mandates of its authorizing statute violates the APA. *See* 5 U.S.C. § 555(b) (agencies must conclude matters before them within a reasonable time); 5 U.S.C. § 706(1) (reviewing court may compel an agency action unlawfully withheld or unreasonably delayed); *Campesinos Unidos v. United States Dept. of Labor*, 803 F.2d 1063, 1068 n.2 (9th Cir. 1986). A delay of four or five years has been held unreasonable. *See, e.g., MCI Telecommunications Corp. v. FCC*, 627 F.2d 322, 340-41 (D.C. Cir. 1980).

This Court has not yet addressed the effect of delay by an administrative agency in carrying out its statutory mandate. The Court should therefore grant certiorari to consider whether DOL's ten year delay meets APA requirements.

E. The Court Should Consider The Validity Of The Regulations Under The Tenth Amendment

This case presents compelling issues under the Tenth Amendment that have not yet been addressed by the Court. The last decision by the Court concerning the FLSA and the Tenth Amendment was *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Court has never considered the impact of the Tenth Amendment on DOL administrative regulations that impinge directly upon local systems of public accountability, including requirements that public employees only

be paid for time worked, and that local officials shall have discretion to impose disciplinary suspensions of any duration. New York's arguments under the Tenth Amendment deserve consideration by the Court.

F. The Court Should Grant Certiorari To Ensure Uniformity With *Auer v. Robbins*

The Court granted certiorari in another salary basis case that raises similar issues. *Auer v. Robbins*, 65 F.3d 702 (8th Cir. 1995), *cert. granted*, 116 S.Ct. 2545 (1996). The Court should grant certiorari in this case to ensure consistency with the Court's eventual decision in *Auer*.

The court in *Auer* did not reach the validity of the salary regulations because it concluded that the defendants met the requirements under the regulations. However, the parties in *Auer* did raise APA and Tenth Amendment arguments very similar to those raised here.

It is critical for the Supreme Court to resolve the validity of the regulations *before* it determines their proper application. This will avoid a gross injustice such as that suffered by public entities after *Abshire v. County of Kern*. Following *Abshire*, circuit courts around the Country began to issue opinions concerning the *application* of the regulations. For five years, public entities faced numerous lawsuits and paid out millions of dollars based on regulations that were later declared invalid by the court in *SEIU*.

To avoid this unjust result, the Court should grant certiorari to ensure that the validity of the regulations is

fully considered before the Court issues a decision concerning how the regulations should apply. At a minimum, the Court should hold its decision on New York's petition until the Court resolves the issues in *Auer*.

V. CONCLUSION

The Court should grant New York's petition for certiorari.

DATED: August 29, 1996

Respectfully Submitted,

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DARREN W. LEE
Deputy City Attorney

LIEBERT, CASSIDY & FRIERSON
ARTHUR A. HARTINGER

Attorneys for Amici Curiae

*Attorney of Record

APPENDIX A

The City of New York [SEAL]

LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, N.Y. 10007

PAUL A. CROTTY
Corporation Counsel
(212) 788-1072

August 21, 1996

Darren W. Lee
Deputy City Attorney
Office of the City Attorney
1390 Market Street, 5th Floor
San Francisco, California 94102-5408

Re: *Giuliani, et al. vs. Yourman, et al.*

Dear Mr. Lee:

The petitioners for a Writ of Certiorari in the above-referenced case hereby consent, pursuant to Supreme Court Rule 36, to the filing of an *amicus curiae* brief by the National League of Cities, *et al.*

Very truly yours,

/s/ Kristin M. Helmers
KRISTIN M. HELMERS
Assistant Chief
Appeals Division

cc: Joan Stern Kiok, Esq.

LAW OFFICES OF
JOAN STERN KIOK
26 BROADWAY – 24TH FLOOR
NEW YORK, NEW YORK 10004-1801

TEL. (212) 747-1414 *FAX (212) 747-1683*

August 21, 1996

Darren W. Lee, Esq.
Deputy City Attorney
Office of the City Attorney
1390 Market Street, 5th Floor
San Francisco, Calif. 94102-5408

Re: *Giuliani v. Yourman*
No. 96-152

Dear Mr. Lee:

Pursuant to your request, respondents hereby consent to the filing of a brief *amicus curiae* by the National League of Cities, *et al.* in support of the Petition for *Certiorari*.

Sincerely yours,

/s/ Joan Stern Kiok
Joan Stern Kiok

c: Kristin M. Helmers
Asst. Chief, Appeals Div.
New York City Law Department

APPENDIX B

INTERESTS REPRESENTED BY AMICI

Government Finance Officers Association

The Government Finance Officers Association (GFOA) is the professional association that represents state and local government finance officials. Its over 12,800 members are the nation's treasurers, finance directors, budget officers, auditors and pension fund administrators. GFOA's mission is to enhance and promote the professional management of governmental financial resources by identifying, developing and advancing fiscal strategies, policies and practices for the public benefit.

International City/County Management Association

The International City/County Management Association (ICMA) is the professional and educational association for appointed administrators and assistant administrators in local government. Its purposes are to enhance the quality of local government and to support and assist professional local administrators in the United States and other countries.

International Municipal Lawyers Association

The International Municipal Lawyers Association (IMLA) is a non-profit, non-partisan organization whose membership includes over 1,500 municipalities. Through local government membership, more than 17,000 attorneys are involved in MIMLO activities. Since 1935, IMLA has helped local government cut legal costs and

research time by serving as a unique national research center, clearinghouse on municipal legal information, municipal publishing house and advocate for the rights of local government.

International Personnel Management Association

The International Personnel Management Association (IPMA) represents more than 1,300 public sector agencies, including personnel departments, civil service commissions and merit system boards at the federal, state and local levels of government. The IPMA also represents over 65,000 individuals, primarily human resource professionals and managers in the public sector and educators in the fields of personnel management and public administration. IPMA's objective is to provide a focus and a forum for the discussion and exchange of views among human resource professionals throughout the United States and abroad.

National Association Of Counties

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Through its membership, urban, suburban and rural counties join together to build effective, responsive county governments. There are 3,043 counties spread across America in all but two states (Connecticut and Rhode Island) and another 28 consolidated city-county governments. Well over one half of all counties are members of NACo. Counties provide a multitude of services and have over 2.2 million

employees in administrative, executive, professional, technical and clerical positions. Each month, counties spend over $4.7 billion to compensate their employees.

National Public Employer Labor Relations Association

The National Public Employer Labor Relations Association (N-PELRA) is a 2,000-member national organization of labor and employee relations professionals who represent state and local governments. It has 15 state chapters and its members negotiate contracts with unions representing over 5 million public employees.

New York State Conference of Mayors and Municipal Officials

The New York State Conference of Mayors and Municipal Officials (NYCOM) is a not-for-profit, voluntary membership association consisting of all of the State's 62 cities and 490 of its 557 villages, thereby representing the great majority of such municipalities. New City is a NYCOM member.

APPENDIX C

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

[SEAL]
THE DIRECTOR

APR 14 1994

Honorable Robert Reich
Secretary of Labor
Washington, D.C. 20210

Dear Mr. Secretary:

It has recently come to my attention that the section 541 regulations of the Fair Labor Standards Act (FLSA), which govern the payment of overtime, are currently the subject of numerous court cases involving employers and employees in the public sector. There is some prospect that similar court cases will continue to arise until the present regulations are reworked to take into account today's highly-educated, service-oriented workforce. The court cases suggest that, due to the outdated nature of the section 541 regulations, some highly compensated public sector employees with responsibilities that would normally exempt them from coverage may be eligible for overtime, a situation that could cost State and local governments hundreds of millions of dollars. I understand that your staff is fully aware of this issue.

I would appreciate it if the Department of Labor would undertake a comprehensive review and revision of the FLSA overtime regulations, as they apply to the public sector, to make them workable in today's economy. I

also would urge you to work with the Office of Personnel Management (OPM) to ensure consistency, to the degree possible, between your Department's regulations and OPM's regulations as they apply to public sector employees.

My staff would be pleased to work with your staff in framing the scope of this review. I think such an undertaking would be an excellent good government exercise. It would dovetail with your effort to improve and streamline the Department's enforcement of Federal labor laws and the Department's quest to ready the American worker and workplace for the 21st Century.

Thank you.

Sincerely,

Original Signed By
Leon E. Panetta
Leon E. Panetta
Director